INDUSTRIAL & AGRICULTURAL DISTRIBUTION SDN. BHD.

v.

GOLDEN SANDS CONSTRUCTION SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' DR. VISU SINNADURAI J.
[SUIT NO. C 2295 OF 1982]
17 AUGUST 1993

CONTRACT: Damages for depreciation - Recovery of rentals - Not suitable for the purpose - Collateral contract - Repudiation of contract - Proof of damages.

The plaintiff sold two units of new Poclain Hydraulic Excavator, to the defendant. Both excavators were delivered to the work-site of the defendant in September 1982. In November 1982, the defendant wrote to the plaintiff to take the machines back as it was unsuitable for its purpose. The defendant, however, did not pay the costs of the two units and the rentals of another two units. The defendant alleged that there was an oral collateral warranty given by the plaintiff to the defendant to the effect that if the defendant found the excavators to be unsuitable, the defendant could return them to the plaintiff without incurring any financial obligations.

Held:

[1] In the present case, there appears to be no sufficient evidence adduced by the defendant to satisfy the Court as to the existence of a collateral contract. The only evidence is the mere assertion by the defendant that such a contract was in existence as a result of the representation made by the plaintiff's sales manager, Mr. Ang. Mr. Ang was not called as a witness nor for the matter, was any other witness called to establish the existence of such a warranty.

[2] There is insufficient evidence to establish that the excavators which were supplied by the plaintiff were unsuitable for the defendant's purpose. The defendant has not established any other evidence other than his own bare assertion that it was unsuitable. The defendant knew the nature and capability of the excavators that were ordered by it. What in fact was supplied to it was the exact model of the excavators as ordered, and in accordance with its own specification.

[3] The action of the defendant when it indicated to the plaintiff that it did not wish to proceed with the purchase of the two excavators and requesting the plaintiff to take them back, clearly went to the root of the contract of sale and amounted to a repudiation of the contract as it evinced an intention not to proceed with the contract for sale.

[4] Damages are not meant to be punitive in nature but rather compensatory, that is, to put the plaintiff in the same position, as far as possible, as he would have been had the contract not been breached by the other party. It is therefore, important for the plaintiff to establish his loss, and not so much as what the defendant has gained from the breach.

[Plaintiff's claim allowed with costs].

Cases referred to:

Esso Petroleum Co. Ltd. v. Mardon [1976] 2 All ER 5 ***(foll)***
J Evans & Sons v. Andrea Merzario [1976] 2 All ER 930 ***(cit)***
Howard Marine v. Ogden & Sons [1978] 2 All ER 1134, 1140 ***(cit)***
Tan Chong & Sons Motor Co. Sdn. Bhd. v. McKnight [1983] 1 CLJ 77 / [1983] 1 MLJ 220 ***(cit)***
Tan Swee Hoe Co Ltd. v. Ali Hussain Bros. [1980] 2 MLJ 16 ***(foll)***
Gillespie v. Cheney Egar & Co. [1896] 2 QB 59 ***(cit)***
Hoyt's Pty. Ltd. v. Spenser [1919] 27 CLR 133 ***(cit)***
Lysnar v. National Bank of New Zealand [1935] NZLR 129 ***(cit)***
City and Westminster Properties [1934] Ltd. v. Mudd [1958] 2 All ER 733 ***(cit)***
Kandasami v. Mustafa [1983] 2 CLJ 55 / [1983] 2 MLJ 85 ***(foll)***
Heilbut Symons v. Buckleton [1913] AC 30, 47 ***(cit)***
Cullinane v. British REMA Manufacturing Co. Ltd. [1953] 2 All ER 1257, 1261 ***(foll)***
Commission Car Sales (Hastings) Ltd. v. Saul [1957] NZLR 144 ***(foll)***
Sio Koon Lin & Anor. v. Mehra [1981] 1 MLJ 225 ***(dist)***
FC Shepherd & Co. Ltd. v. Jerrom [1986] 3 All ER 589 ***(foll)***
Hochster v. De La Tour [1853] 2 E & B 678 ***(cit)***
Federal Commerce and Navigation Co. Ltd. v. Molena Alpha Inc [1979] 1 All ER 307 ***(cit)***
Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd. [1980] 1 All ER 571 ***(foll)***
Charter v. Sullivan [1957] 1 All ER 809 ***(cit)***
Luna Park (NSW) Ltd. v. Transways Advertising Pty. Ltd. [1938] 61 CLR ***(foll)***

Legislation referred to:

Contracts Act, s. 40
Sale of Goods Act, s. 60

Other sources referred to:
Benjamin's Sale of Goods, 3rd Edn., paras 1307-1308, 1313
Chitty on Contracts, Vol. 1, 25th Edn., paras 734, 735
41 Halsbury's Law of England, 4th Edn., paras 681, 867
Interpretation of Contracts, Lewison, (1989), para 2.07
Law of Contract in Malaysia and Singapore, Sinnadurai, 2nd Edn.

For the plaintiff - ET Low; M/s. MP Rajah & ET Low
For the defendant - Gurubakhash (Sheena Gurbakhash with him); M/s.Gurbakhash & Tan

JUDGMENT

Dr. Visu Sinnadurai J:
The plaintiff's action against the defendant is for damages for breach of contract arising from the sale of two new units of excavators sold by the plaintiff to the defendant. The plaintiff's claim is for the loss of the depreciated value of the two excavators which were recovered by the plaintiff from the defendant as a result of the repudiation of the contract by the defendant for the sale of the excavators.

The plaintiff's claim against the defendant is also for the recovery of rentals for two other units of excavators namely one unit of New 115 CL Poclain Excavator and one used 90 CL Poclain Excavator which the plaintiff alleges were rented to the defendant.

The plaintiff in its statement of claim avers that by two agreements dated 23 August 1982, the plaintiff agreed to sell two units of new Poclain Hydraulic Excavator, model 160CK at the price of RM290,000 each. A discount of RM20,000 was given by the plaintiff to the defendant towards the cost of the price of the two units of excavators. On 21 September 1982, the plaintiff delivered to the defendant one unit of the excavator, and on 28 September 1982, the second unit was delivered to the defendant. Both the excavators were delivered to the work-site of the defendant.

In pursuance to a letter written by the defendant to the plaintiff whereby the defendant informed the plaintiff to take the machines back from the defendant's site, the plaintiff removed the two excavators from the defendant's site on 14 November 1982. The defendant in his letter to the plaintiff informed the plaintiff that the new excavators were found to be unsuitable for its purpose.

The plaintiff alleges that as a result of the failure of the defendant to pay the cost of the two new units of excavators and the rentals for the other two units of excavators, the plaintiff has suffered loss and damage. In its statement of claim, the plaintiff particularises the damage suffered as a consequence of the defendant's breach.

The Defence

The defendant in its defence has not disputed the fact that it had agreed to purchase the two new excavators and that the excavators were in fact delivered to the defendant as stated by the plaintiff. The defendant, however, contends that the two excavators delivered by the plaintiff were not suitable for the purpose for which they were purchased as, amongst other reasons, the two excavators were not capable of bearing the weight of the 1.8 cu yd buckets which had been fitted to the excavators. The defendant alleges that acting under a oral collateral warranty given by the plaintiff to the defendant to the effect that if the defendant found the excavators delivered to it to be unsuitable, the defendant could return them to the plaintiff without incurring any financial obligations, the defendant requested the plaintiff to take the excavators back, without having to pay the plaintiff any sum of money.

The Issues

The issues before the Court are rather straightforward and they are as follows:

(i) whether the defendant has established that the plaintiff did make the oral collateral warranty as asserted to by the defendant;
(ii) whether, if it has been established that there was such oral warranty, the defendant was justified in returning the excavators to the plaintiff and in refusing to pay the purchase price;
(iii) whether, if there is no evidence of the existence of such a warranty, the defendant's refusal to pay for the excavators amounted to a repudiation of the contract.
(iv) whether, the plaintiff is entitled to receive rentals for the two other machines;
(v) the quantum of damages the plaintiff is entitled to, if there has been a breach of the contracts.

The Trial

The plaintiff commenced the present action against the defendant sometime in late 1982. However, the request to set down the action for trial was made only on 12 June 1987. In September 1988, Senior Assistant Registrar of the High Court informed the parties that the action had been entered in the trial book. The case was set down for trial on 15 February 1993 before this Court, and the trial was fixed for 20, 22 and 23 April 1993. At the trial, the Court was informed that there had been a change of solicitors and that the plaintiff was now represented by M/s. MP Rajah & ET Low. The trial proceeded as scheduled during the three days.

I state this background as to the chronology of events leading to this trial to explain the delay of almost ten years before this trial was heard. It appears that because of this delay, the parties had difficulty in locating their key witnesses. As a result, the plaintiff only produced two witnesses and the defendant only one.

The plaintiff's witnesses were Mr. Santhasekran (PW1) and Mr. Balakrishnan (PW2), whereas the defendant's only witness was Mr. Wong Siam Shin who was then the managing director of the defendant company.

Plaintiff's Witnesses

The plaintiff's first witness, Mr. Santhasekran (PW1) said that he was the workshop manager of the plaintiff's company at the material time of the sale of the excavators. His job functions were to look after the after-sales operation of the excavators sold by the plaintiff. This witness informed the Court that two work orders were issued for the sale of the excavators to the defendant. He said that the excavators were initially fitted with 1.2 cu yd buckets and that at the request of the defendant and after consultation with the suppliers in France, a bigger bucket of 1.8 cu yd was fitted to each of the excavators. The witness said that certain after-sales services were done on these two excavators, and that at no time did the defendant inform him as to the unsuitability of the excavators. He admitted that there were a number of breakdowns of the excavators and that a special team had been assigned by the plaintiff to be located at the defendant's site to rectify any technical problems to the excavators. He said there were no major defects to the excavators and that only the hydraulic oil and hose had to be replaced.

During cross examination, the witness said he was unaware of any discussion between the defendant and the sales manager of the plaintiff's company, one Mr. Ang. He said he was not aware whether Mr. Ang had given any oral warranty to the defendant.

The plaintiff's next witness, Mr. Balakrishnan was an administrative executive in the plaintiff's company at the material time. He was then the administrative and credit controller. He merely confirmed that the sale documents and invoices were forwarded to his department for collection.

Defendant's Witness

The defendant only called one witness, namely Mr. Wong Siam Shin who was then the managing director of the defendant company. Mr. Wong said in his evidence that he negotiated the sale for the purchase of the two excavators with one Mr. Ang who was then the sales manager of the plaintiff company. Mr. Wong said that he ordered two excavators fitted with buckets with the capacity of 1.8 cu yd and that the terms of payment were as stated in the order forms (D1 & D2). Mr. Wong said that the sales manager, Mr. Ang had told him that if the excavators could not be fitted with 1.8 cu yd buckets, the plaintiff would take the excavators back. When asked whether the excavators were fit for the purpose for which they were bought, Mr. Wong said that the excavators could not bear the weight when the 1.8 cu yd buckets were fitted to them. Mr. Wong then added that when the plaintiff was aware that the excavators could not take the weight of the 1.8 cu yd buckets, they took the excavators back.

As for the payment for the excavators, Mr. Wong said that no payment had been made by the defendant's company as the time for payment had not been due then. He said that the plaintiff took back the excavators before the due date. During cross examination by the plaintiff's Counsel, Mr. Wong said that when the excavators were first delivered, they were fitted with 1.2 cu yd buckets and not with the 1.8 cu yd buckets which had been ordered. However, he then said that the 1.8 cu yd buckets which had been ordered were fitted to the excavators some ten days after they were delivered to the defendant. Again under cross examination, Mr. Wong said that he wrote the letter to the plaintiff to take the excavators back only two months after it was delivered because he had verbally told Mr. Ang earlier about its unsuitability. He

admitted, however, that though the excavators were not suitable, the excavators were, in fact used by the defendant at its worksite. During re-examination, Mr. Wong said that he had not used the excavators since 11 October 1982.

Undisputed Evidence

The evidence before the Court appear to establish the following facts:

(i) the defendant agreed to purchase the two excavators;
(ii) the plaintiff delivered the said excavators;
(iii) before the delivery of the said excavators, the plaintiff had delivered two other units of excavators for the use by the defendant until the new excavators were delivered;
(iv) the defendant did use the old excavators as well as the new ones for their operations;
(v) the defendant then informed the plaintiff that the new excavators were not suitable and therefore requested the plaintiff to take them back;
(vi) the plaintiff did take back the two new excavators.

Sale of the New Excavators

I shall first deal with the plaintiff's claim regarding the sale of the two new excavators. In this regard, one fact is clearly not disputed by both the parties: the plaintiff agreed to sell the two excavators and that the defendant agreed to purchase the two excavators. What, however, is disputed is whether the excavators that were supplied by the plaintiff were in accordance with the specifications requested for by the defendant.

The plaintiff asserts that the excavators that were supplied were in accordance with the terms that were agreed upon by the parties. The defendant, however, alleges that the excavators were not suitable for the purpose for which the defendant had bought them and as such it was entitled under the oral collateral warranty given by the plaintiff to return the excavators without having to pay anything for them.

I now consider the issue as to whether there was a oral collateral warranty.

(i) *Whether the defendant has established the existence of a oral collateral warranty?*

The question as to whether the defendant has established the existence of a oral collateral warranty as to the suitability of the machines is relevant in determining whether the defendant had a right to return the two machines to the plaintiff.

At this juncture, it must be emphasised that the oral collateral warranty alleged by the defendant is that the plaintiff's then sales manager, Mr. Ang had informed the defendant that if the excavators were found to be unsuitable, the defendant was at liberty to return them to the plaintiff without incurring any obligation.

I should, perhaps point out that the use of the term oral collateral warranty by the defendant in its pleadings as well as in Court is not a happy one. Traditionally, a oral collateral warranty, is merely a term of a contract, the breach of which only entitles the party to sue for damages and does not give the party the right to repudiate the contract. Lord Denning MR in *Esso Petroleum Co. Ltd. v. Mardon* [1976] 2 All ER 5 stated (at p. 13):

> Ever since *Heilbut Symons & Co. v. Buckley*, we have had to contend with the law as laid down by the House of Lords that an innocent representation gives no right to damages. In order to escape from that rule, the pleader used to allege ... that the misrepresentation was fraudulent, or alternatively a collateral warranty ... there have been many cases since I have sat in this Court where we have readily held a representation - which induces a person to enter into a contract - to be a warranty sounding in damages. ...

In *J Evans & Sons v. Andrea Merzario* [1976] 2 All ER 930, an oral assurance was held to be an enforceable contractual promise; whereas in *Howard Marine Ogden & Sons* [1978] 2 All ER 1134, the oral representations were held not to be contractual warranties. See also the observations of Salleh Abbas LP in the Federal Court decision of *Tan Chong & Sons Motor Co. Sdn. Bhd. v. McKnight* [1983] 1 MLJ 220, where his Lordship highlighted the confusion caused by the loose use of the term collateral warranty and collateral contracts.

In the present case, the defendant is not suing for damages based on the oral statement allegedly made by the plaintiff but is seeking the right to terminate the contract. Therefore, the term cannot be interpreted to mean a collateral warranty as stated by Lord Denning MR, above. I, therefore, take the use of the term by the defendant to mean a collateral contract.

A collateral contract is defined by **Chitty on Contracts,** Vol. 1, 25th Edn., para 734 as follows:

> ... the Courts are prepared in some circumstance to treat a statement intended to have contractual effect as a separate contract or warranty collateral to the main transaction.

See also **41 Halsbury's Law of England,** 4th Edn., para 681 note 7.

Similarly, Raja Azlan Shah CJ (as he then was) in the leading case on collateral contracts in Malaysia, *Tan Swee Hoe Co. Ltd. v. Ali Hussain Bros.* [1980] 2 MLJ 16 (FC) said:

> In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

I do not intend to give a full discourse on the principles governing collateral contracts, except to say that a cautious approach is adopted by the courts in recognising the existence of a collateral contract, especially in cases where it contradicts the terms of a written contract. The objective, however, of using the device of the collateral contract is usually to enforce a promise made prior to the making of the main contract, and but for which the main contract would not have been made.

It is an established principle of law that the burden of proving the existence of a collateral contract is on the party alleging its existence. In *Gillespie v. Cheney Egar & Co.* [1896] 2 QB 59, Lord Russell of Killowen CJ said:

> When parties have arrived at a definite written contract, the presumption is that the writing was intended to contain all the terms of the contract; but it is a presumption only, and either party may allege an antecedent express stipulation intended to continue in force with the written contract, and may contend that the written contract was not intended to include all the terms.

It is sometimes said that a collateral contract may merely add, but not contradict the main agreement: see Lewison, **Interpretation of Contracts** (1989), para 2.07; and the Australian case of *Hoyt's Pty. Ltd. v. Spenser* [1919] 27 CLR 133. In *Lysnar v. National Bank of New Zealand* [1935] NZLR 129, Lord Wright, in delivering the advice of the Privy Council said:

> Though the collateral contract must, inevitably, it seems, add to the written contract, it must not vary it in the sense of being inconsistent with or contradictory of, the written contract to which it is collateral ...

Such a view, however, is no longer accepted as the general rule: see *City and Westminster Properties (1934) Ltd. v. Mudd* [1958] 2 All ER 733. Raja Azlan Shah CJ (as he then was) in *Tan Swee Hoe,* above, said:

> In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts.

Similarly, Lord Brightman, in the Privy Council decision of *Kandasami v Mustafa* [1983] 2 MLJ 85, on appeal from Malaysia, said:

> If parties put their names to a document, and one party represents and the other party agrees that the document shall not, as between themselves, have any legal effect so that it exists only to answer some other purpose, the law will give effect to that collateral agreement and deny the document whatever legal effect it might otherwise have had.

The question that needs to be addressed now is whether the defendant has adduced sufficient evidence to establish that the plaintiff made the oral statement, amounting to a collateral contract to the defendant that if the defendant found the excavators to be unsuitable, the defendant could return them to the plaintiff. It should be borne in mind that no such term is incorporated into the sales invoices. The sales invoices, clearly indicate that the two excavators were an outright sale to the defendant by the plaintiff. The invoices expressly provide for the description of the goods, and the mode of payment, *viz* sixty days credit with payment over four monthly instalments. However, the defendant relies on the alleged oral representation made by the plaintiff specifically by Mr. Ang, that the plaintiff was prepared to treat the delivery of the two excavators to the defendant on a 'trial basis'.

As stated earlier, the onus of establishing the existence of a collateral contract is, of course, on the defendant. The defendant has to establish sufficient evidence to show that the plaintiff and

the defendant agreed to the making of a collateral contract independent of the main contract. The main contract in this case is for the sale and purchase of the two excavators. The collateral contract, the existence of which as alleged by the defendant, is that the parties agreed that if the excavators were found unsuitable by the defendant, the defendant could return them without any financial obligations to the plaintiff.

In the present case, there appears to be no sufficient evidence adduced by the defendant to satisfy the Court as to the existence of such a collateral contract. The only evidence is the mere assertion by the defendant that such a contract was in existence as a result of the representation made by the plaintiff's sales manager, Mr. Ang. Mr. Ang was not called as a witness nor for that matter, was any other witness called to establish the existence of such a warranty. The mere fact that the defendant deemed that it was rightful for him to return the two excavators to the plaintiff, does not in itself establish the existence of such a collateral contract. In any case, I am unable to accept the evidence of Mr. Wong alone as sufficient to establish the existence of a collateral contract. As it is often said, 'such collateral contracts must from their very nature be rare': per Lord Moulton in *Heilbut Symons v. Buckleton* [1913] AC 30, 47. (But see the observation of Lord Denning MR in *Howard Marine v. Ogden & Sons* [1978] 2 All ER 1134, 1140.

Therefore, in the absence of any evidence, this Court finds that the defendant has failed to establish the existence of any oral collateral contract, or for that matter, even a collateral warranty.

Even if I am wrong in so holding, the argument that the defendant has a right to terminate the contract, by virtue of the oral collateral contract is misconceived. A collateral contract, by its very nature exists side by side with the main contract. It does not have the effect of substituting the main contract. A collateral contract merely confers certain other rights which are not incorporated in the main contract. But such rights must be related to the rights and obligations of the parties under the main contract.

In the present case, there is clearly an agreement between the parties for the sale and purchase of the two excavators. However, if the defendant's contention is accepted, the effect of the alleged collateral contract is to obliterate the main contract of sale or to convert it into a conditional contract. There cannot be a collateral contract without the main contract being in existence. If the defendant is allowed to return the excavators without incurring any financial obligation to the plaintiff, the main contract becomes meaningless as the defendant is no longer under any obligation to buy the excavators under the main contract.

It would have been different, if the defendant has alleged, as often is the case in collateral contract, that the plaintiff gave an assurance that the two excavators were capable of bearing the weight of the 1.8 cu yd buckets as well as the 1.2 cu yd buckets. In such a case, the defendant may bring an action against the plaintiff for misrepresentation, or breach of condition or warranty under the collateral contract. To say that the promise made by the plaintiff that the defendant could return the excavators, tantamounts to the cancellation of the fundamental term of the main contract. To invoke the concept of collateral contract to cover such a situation is to stretch the scope of collateral contracts beyond their legitimate limits. Any representation made by a party to the contract which has the effect of destroying the main contract, cannot become a collateral contract. It may be anything else, but certainly not a collateral contract, as a collateral contract normally relates to a warranty and not to a fundamental term of the main contract.

Furthermore, it should be pointed out that, in any case, a breach of a collateral contract only gives right to an action for damages for its breach and not a right to repudiate. As **Chitty on Contracts,** quoted above states (at para 735):

> Breach of the collateral contract will give rise to an occasion for damages for its breach, but not to a right to treat the main contract as repudiated.

As the defendant's contention based on the collateral contract or warranty is misconceived, the defence must necessarily fail. However, for purposes of completeness, I move on to consider whether the excavators were unsuitable.

(ii) *Whether excavators were suitable for the defendant's purpose?*

Even if the defendant could establish the existence of the oral collateral contract, the defendant may only be able to invoke the oral

collateral contract, if the defendant can also establish that the excavators supplied by the plaintiff were in fact unsuitable for the defendant's purpose.

The plaintiff's witness, Mr. Santhasekran (PW1) who was the workshop manager said in evidence that he consulted the principal manufacturer in France who had assured him that the excavators were capable of being fitted with 1.8 cu yd buckets, as required by the defendant. He also said that the two excavators were serviced on a routine basis and that the breakdowns of the excavators as alleged by the defendant were not major. They merely related to the change of the hydraulic hose and the hydraulic oil. He also said that to his knowledge there were no major defects in the excavators nor did the defendant complain to him of the unsuitability of the excavators.

The witness also said that because the defendant was a potential customer which the directors of the plaintiff company intended to have more business with, a special after service team was assigned to the defendant's worksite to ensure that good service to the defendant was provided and also to rectify immediately any mechanical problems to the excavators. He expressly denied during cross-examination that the excavators could not be fitted with 1.8 cu yd buckets. He admitted, however, because of the extra load factor, some problems were anticipated with regard to the hydraulic system of the excavators, none, however, which will deprive the defendant of the use of the excavators for any significant period.

The defendant, although alleging that the excavators were unsuitable, tendered no evidence to substantiate its allegation. Much of the evidence given by the only witness for the defence, centred around the issue as to whether the oral collateral warranty (contract) was made by the plaintiff. When asked during examination in chief whether the excavators that were delivered were fit for the purpose for which they were purchased, he merely said, "No, because the excavators could not bear the weight of the 1.8 cu yd buckets". When asked during cross-examination whether he had personal knowledge of the unsuitability of the excavators, he could not give a firm answer. Furthermore, he admitted that the excavators were used by the defendant for over a period of two months, even though he maintained that he found the excavators unsuitable from the time they were fitted with the 1.8 cu yd buckets.

In considering the totality of the evidence, I find that there is insufficient evidence to establish that the excavators which were supplied by the plaintiff were unsuitable for the defendant's purpose. The defendant has not established any other evidence, other than his own bare assertion that it was unsuitable. The defendant knew the nature and capability of the excavators that were ordered by it. The defendant wanted the capacity of the buckets to be changed from the standard 1.2 cu yd to 1.8 cu yd so as to minimise the cost of the operation of his business. What in fact was supplied to him was the exact model of the excavators as ordered, and in accordance with its own specifications, fitted with 1.8 cu yd buckets.

The defendant was not supplied with an entirely different model of the excavators nor for that matter, a totally different machine which could not be used for the purpose for which it was ordered - the excavators were still capable of excavating sand, though probably in lesser quantity. It is not a question of peas being delivered for beans ordered.

Even if the plaintiff gave an assurance that the 1.8 cu yd buckets could be fitted to the excavators, and that the excavators did not function as well as the defendant wanted them to, the defendant's recourse against the plaintiff, as pointed out earlier, would be for damages for breach of warranty. As Sir Evershed MR (as he then was) said in *Cullinane v. British REMA Manufacturing Co. Ltd.* [1953] 2 All ER 1257, 1261:

> As a matter of principle again, it seems to me that a person who has obtained a machine ... which was mechanically in exact accordance with the order given, but was unable to perform a particular function which it was warranted to perform, may adopt one of two courses. He may, when he discovers its incapacity and that it is not what he wanted and is useless to him, claim to recover the capital costs he has incurred less anything he can obtain by disposing of the material that he got. A claim of that kind puts the plaintiff in the same position as though he had never made the contract at all. ... Alternatively, he may, where the warranty in question relates to performance, make his claim on the basis of the profit he has lost, because the machine as delivered fell short in its performance of that which it was warranted to do.

(iii) *Breach of Contract by the Defendant*

The action of the defendant when it indicated to the plaintiff that it did not wish to proceed with the purchase of the two excavators and requesting the plaintiff to take them back, clearly went to the root of the contract of sale and amounted to a repudiation of the contract as it evinced an intention not to proceed with the contract for sale. In *Commission Car Sales (Hastings) Ltd. v. Saul* [1957] NZLR 144, the Supreme Court of New Zealand held that the buyer who returned the car which he had promised to buy and intimated that he would not pay for it, had repudiated liability for its purchase and the seller, by accepting the car, was taken to have treated the contract as discharged by breach. On a repudiation of the contract, the plaintiff has the choice either to accept the repudiation or to affirm the contract: see s. 40 of the Contracts Act and the cases referred to on this section in Sinnadurai, **Law of Contract in Malaysia and Singapore,** 2nd Edn. In the present case, when the plaintiff took possession of the two excavators, it, in fact accepted the defendant's repudiation of the contract.

The argument by the defence that the defendant could not have repudiated the contract at that stage (when they wrote the letter to the plaintiff) since on that date none of the payments were then due, is unacceptable as the act of the defendant clearly amounted to one which the plaintiff could treat as an anticipatory breach of the contract. The decision of the Federal Court in *Sio Koon Lin & Anor. v. Mehra* [1981] 1 MLJ 225, which was referred to by Counsel is, therefore, not only irrelevant but clearly distinguishable. As Mustill LJ (as he then was) said in *FC Shepherd & Co. Ltd. v. Jerrom* [1986] 3 All ER 589, at 600:

> If the promisor renounces the contract, or disables himself from performing it, the promisee may elect to treat the contract as broken by anticipation, and may sue for damages without waiting for the time for performance to arrive: see *Hochster v. De la Tour* [1853] 2 E & B 678, [1843-60] All ER Rep 12 and many subsequent cases.

As to anticipatory breach, see s. 60 of the Malaysian Sale of Goods Act (Act 382) and generally, **41 Halsbury's Laws of England,** 4th Edn., para 867 and **Benjamin's Sale of Goods,** 3rd Edn., para 1307-1308.

It should further be pointed out that a refusal by a party to proceed with the contract based upon a misconstruction of the contract or on the erroneous belief that he was justified in terminating the contract, may amount to a repudiation of the contract, especially so, if the party evinces an intention to perform only in accordance with his construction of the contract. Such was the situation in *Federal Commerce and Navigation Co. Ltd. v. Molena Alpha Inc* [1979] 1 All ER 307, where, because of their erroneous construction of the contract, the shipowners threatened to act in a way which was substantially inconsistent with their obligations. The conduct of the shipowners in so acting was held by the House of Lords to amount to a repudiation of the contract. Lord Denning MR in the Court of Appeal [1978] 3 All ER 1066 said (at page 1082):

> I have yet to learn that a party who breaks a contract can excuse himself by saying that he did it on the advice of his lawyers; or that he was under an honest misapprehension ... I would go by the principle ... that, if the party's contract, objectively considered in its impact on the other party, is such as to evince an intention no longer to be bound by his contractual obligations, that it is open to the other party to accept by repudiation and treat the contract, as discharged from that time onwards.

In this regard, the minority view of the House of Lords in *Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd.* [1980] 1 All ER 571, is to be preferred.

(iv) *Measure of Damages*

The plaintiff, as stated earlier, has claimed for loss and damage suffered as a consequence of the defendant's breach. In particularising its loss, the plaintiff claims for the depreciated value of the excavators. The plaintiff did not claim for the loss of profit nor for any loss resulting from a subsequent resale of the excavators to a third party. The claim is basically for depreciation loss of the two excavators. Of course, in a normal situation such as this, the seller would have claimed for the difference between the market price, when the goods were subsequently sold in the market, and the contract price. However, this is not the situation in the present case. The plaintiff in claiming for the depreciation loss of the two excavators, did not adduce any proof of any such loss. No evidence was adduced to show that the excavators had depreciated in value by 20% when they were recovered from the defendant.

Counsel for the plaintiff urges this Court to take judicial notice of the fact that any vehicle or machine depreciates in value after it had been sold to another person. In the absence of any authority to support this proposition this Court is unable to concede to the plaintiff's contention.

It should be further remembered that damages are not meant to be punitive in nature but rather compensatory, that is, to put the plaintiff in the same or similar position, as far as possible, as he would have been had the contract not been breached by the other party. It is, therefore, important for the plaintiff to establish his loss, and not, so much as what the defendant had gained from the breach. Therefore, the Court, cannot, in the absence of any proof of actual loss by the plaintiff, grant the plaintiff any sum by way of damages. Even if the Court were to concede that there was an element of depreciation of the value of the excavators, in the absence of any proof to show the actual loss, the plaintiff's claim must fail. There may be a situation where the plaintiff may have sold the excavators subsequently to a third party at a profit. In such a case, the plaintiff would have suffered no loss.

Therefore this Court is unable to grant any sum of money by way of damages to the plaintiff except by way of nominal damages. In *Charter v. Sullivan* [1957] 1 All ER 809, nominal damages were granted as the seller was unable to produce any evidence of loss of profit as a consequence of a buyer's refusal to complete the purchase. Similarly, the High Court of Australia in the case of *Luna Park (NSW) Ltd. v. Transways Advertising Pty. Ltd.* [1938] 61 CLR, also granted nominal damages, even though there was a breach of a condition of the contract. I, therefore, grant a sum of RM100 by way of nominal damages to the plaintiff.

As for the other claims by the plaintiff, loss of use of the said machines at RM15,000 per machine, again in the absence of any proof by the plaintiff of this loss, the plaintiff's claim under this head also fails.

As for the plaintiff's claim for transport and possession charges, these stand on a different footing, as these have been substantiated by documentary evidence, and as such I allow RM1,000 under this head: see **Benjamin's Sale of Goods,** 3rd Edn., para 1313.

I also allow the claim for RM2,485 being charges for repairs and services of the two excavators during the period when they were used by the defendant, as the defendant was contractually bound to pay for these items.

Rental of the Two Other Machines

The entire trial centered on the sale of the two excavators, and except as stated in the statement of claim, the plaintiff gave no evidence as to any rental arrangement between the plaintiff and the defendant regarding the other two excavators. In the absence of evidence, it appears that these two machines were lent to the plaintiff for the defendant's use until the new machines arrived.

I, therefore, hold that, as the plaintiff has not made out its case with regard to the rental of the two other excavators, the claim is dismissed.

As the plaintiff has succeeded substantially in its action against the defendant, I order that costs be awarded to the plaintiff.

ISAAC IYADURAI A/L NALLAPERUMAL & 26 ORS.

v.

VEDHA RATNAM S/O VALIAPPAN & ANOR.

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[ORIGINATING SUMMONS NO. 24-300-1991]
30 JANUARY 1992

TRUSTS: First defendant purchaser of land - First defendant dividing land into sub-lots and selling the sub-lots - First defendant failing to obtain sub-division of land and transfer land to sub-purchasers - Sub-purchasers applying for declaration of trust.

The first defendant purchased a piece of land and caused it to be divided into twenty five sub-lots which he then sold to various sub-purchasers under common form sub-sale agreements. It was a term of the sub-sale agreements that the first defendant would transfer the title to the said land to his own name as trustee and would subsequently apply for sub-division of the said land in accordance with the plan.

The first defendant in fact got the land registered in his own name and the sub-purchasers applied for a declaration of trust and for consequential orders. The first defendant contended that the sub-purchase agreements were frustrated because his application for sub-division was rejected and sought to rescind the sub-purchase agreements.

Held:

[1] From the date of each sub-purchase agreement the first defendant became the trustee of each sub-lot for the sub-purchaser in question.

[2] The alleged frustration was self-induced as the first defendant's application for conversion and sub-division was not supported by the proper documentation.

[3] The first defendant had not explained or in any way sought to mitigate his misconduct in dealing with the trust property as though it was his own. A more blatant case of breach of trust would be hard to imagine.

[Plaintiffs application allowed. Consequential orders made].

For the plaintiffs - Ram Sing; M/s. Dusing & Co.
For the 1st defendant - Proctor; M/s. Y.S. Woo & Proctor

[**Ed. Note:** The defendants' appeal to the Supreme Court vide Supreme Court Civil Appeal No. 02-63-92 was dismissed with costs on 4 May 1993].

JUDGMENT

Mahadev Shankar J:

This is a claim for a declaration of trust with regard to land and for consequential orders.

Geran No. 19342 Lot 11056 in the Mukim of Klang (the said land) was originally registered in the name of one Periathamby Chettiar. He sold the said land to Ng Koon Leong and Go Pin but died before the land could be registered in their names. So Ng and Go applied to Court for a vesting order.

Whilst this application was pending, on 13 January 1975 Ng and Go entered into a written agreement to sell the said land to the first defendant for RM54,704.80. A 10% deposit was paid on execution of this agreement. Eight percent of the balance of the purchase price was to be paid by 10 February 1975 and thereupon the first defendant was to be allowed into possession. After obtaining the vesting order completion was to take place whereupon the final 10% was to be paid. This took place on or about 10 May 1976.

The said land is square. The first defendant had the land surveyed and divided into twenty-five sub-lots most of them measuring about 10,816 sq. ft. There were some larger lots ranging between about 11,000 sq. ft. to about 12,300 sq. ft. These twenty-five sub-lots were delineated on a scale plan (the said plan) which he then used as a basis for the sale of individual sub-lots to various sub-purchasers.

These sub-sale agreements are in common form and were prepared by the first defendant's solicitors. They were signed by the sub-purchasers on various dates commencing 28 February 1975. The purchase price for each sub-lot was paid in full. I consider it significant that clause 4 of the sub-purchase agreement provided that the sub-purchaser was entitled to occupy his portion with effect from 10 February 1975 or so soon thereafter as the first defendant obtained vacant possession. It is reasonable to infer from

this back-dating that the first defendant was using the moneys he collected from the sub-purchasers to pay up Ng and Go aforesaid.

The sub-purchase agreements makes it manifestly obvious that upon full payment of the purchase price each sub-purchaser was to be regarded as the beneficial owner of his sub-lot. By clause 5(a) of the sub-purchase agreement the first defendant undertook to obtain the transfer of the title to the said land, "to his own name as trustee as soon as possible and as soon as the title is in his own name as trustee to apply for sub-division" of the said land in accordance with the said plan.

This he did not do. He got the said land registered in his own name, on 10 May 1976. On 15 September 1976 he charged the said land for his own benefit to the Co-operative Central Bank Bhd. This was discharged on 29 May 1982. He then charged it again to K.L. Finance Bhd on the same day. He failed to service this loan and the land was put up for auction on 26 November 1983. Fortunately for the sub-purchasers this sale did not go through, and the charge was discharged on 18 May 1985.

Several sub-purchasers caveated the said land. They have now come to this Court for the relief aforesaid.

It is the opinion of this Court that from the date of each sub-purchase agreement the first defendant became the trustee of each sub-lot for the sub-purchasers in question. They had paid in full. The area they had brought was certain. They had no right to complain about any minor adjustments required for the issue of separate documents of title. It was even expressly provided that they were not entitled to rescind the agreement under any circumstances. They were to pay all outgoings including the proportionate sub-division charges and the costs incurred in the execution of the trusts. In the event of acquisition they were only entitled to their proportion of the compensation paid.

The sub-purchasers filed a Civil Suit in the K.L. High Court on 18 May 1985 for similar relief against the first defendant. After that suit was filed the first defendant made a haphazard application on 8 May 1986 for conversion and subdivision. That application was not supported by the proper documentation. It was consequently rejected on the 23 July 1988, by the relevant authority. The Civil Suit filed in the K.L. High Court has been withdrawn and the sub-purchasers are relying on these proceedings for the relief claimed.

The first defendant's defence is that the sub-purchase agreements have been frustrated because his application for sub-division was rejected. He therefore asserts that each of the sub-purchase agreements should be rescinded and he be allowed to refund them what they paid. But this alleged frustration is self-induced. He does not explain or in any way seek to mitigage his misconduct in dealing with the trust properly as though it was his own. I reject this defence.

A more blatant case of breach of trust would be hard to imagine. The first defendant must therefore make amends.

I now make the following orders:

(1) that the first defendant's name be deleted from the original and issue document of title to the said land by the Pentadbir Tanah Daerah in the Mukim of Klang or other relevant authority.

(2) that the first, fourth, fourteenth and twenty-second plaintiffs be appointed trustees of the said land and be registered on the original and issue document of title as such by way of a vesting order.

(3) that the first defendant do forthwith surrender the issue document of title to the said land to the plaintiffs' solicitors for onward transmission to the PTD Mukim Kelang together with a sealed copy of this order;

(4) that the first defendant do disclose full particulars of the person to whom sub-lot 21 was sold and supply the four plaintiff trustees with any further information required to complete their list of the beneficial owners of all 25 sub-lots comprised in the said property;

(5) that the caveats filed by the sub-purchasers against the said land be lifted if so required for the registrations to be affected to this order;

(6) that the plaintiff trustees hereby appointed be and are hereby given liberty to apply for any further directions with a view to recovering relief for breach of trust, and for giving each of the beneficiaries his due remedy;

(7) that the costs of these proceedings be taxed on a solicitor and client basis and be paid by the first defendant to the plaintiffs.

JOSEPH SINGARAM PILLAY

v.

MALAYSIAN BAR

HIGH COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[ORIGINATING SUMMONS NO. S1-24-286-93]
2 JULY 1993

LEGAL PROFESSION: Withholding of issue of Sijil Annual - Reasons for withholding - Whether defendant made enquiries before withholding the issue of Sijil Annual - Whether plaintiff given opportunity to exculpate himself - Whether defendant exercised its powers correctly.

The defendant refused to issue the plaintiff with a Sijil Annual for the year 1993 on the grounds that the plaintiff had failed to comply with the provisions of the Legal Profession Act 1966 (the Act) in that he had failed to produce the accountants Certificate for his branch office.

The plaintiff claimed that in 1990 he had associated with a lawyer in Kuala Lumpur which association had ceased in 1991. The plaintiff stated that he was never a signatory to either the office or the clients' account of the Kuala Lumpur office and disclaimed any definite arrangement of partnership contending that each lawyer minded his own practice alone.

The plaintiff applied for an order directing the defendant to issue the Sijil Annual to him and in the interim obtained an *ex parte* injunction against the defendant. The defendant applied to set aside the injunction on the grounds that it was contrary to law in that it fettered the hands of the defendant in the lawful pursuit of its functions and objectives.

Held:

[1] Where a statute has provided a full right to appeal to a Court against an official decision, as in this case, the Court should be able to apply its own view of the merits provided it has due regard to the opinions of the authority which made the first decision. In all cases of depriving a man of his livelihood or in frustrating legitimate expectation, fairness is of paramount importance.

[2] The defendant did not consider the reasons for the non-production of the accounts for the branch office and did not consider the plaintiff's request with the care it deserved although it involved him being deprived of his livelihood indefinitely causing him loss of his career.

[3] The evidence showed that the plaintiff has an unblemished character as a professional and there was no complaint from any source involving him. There was also no suggestion of his involvement in the affairs of the Kuala Lumpur lawyer. The Act and The Solicitors Account Rules 1990 gives the defendant wide discretionary power to exempt the plaintiff from the strict requirements of the rules relating to submission of accounts.

[4] The withholding of the Sijil Annual would not serve anyone's interest and would cause injustice. In any event the effect of withholding the Sijil Annual is equivalent to suspending a lawyer which is the prerogative of the Chief Justice only at the instance of the Bar.

[5] The injunction being an equitable remedy, the Court would invoke it even against statutory authorities unless forbidden by the legislature. The injunction was not a validation of wrongful acts of the plaintiff or of anyone else but was intended to be an order against the defendant from alleged abuse of power in the desperate circumstances claimed by the plaintiff in his *ex parte* application. In any event the injunction was of absolutely temporary nature and there was no instance of any prejudice caused at all.

[Defendant directed to issue Sijil Annual for the year 1993 to the plaintiff. Injunction directed to dissolve upon the issue of the Sijil Annual. Parties to bear their own costs].

Cases referred to:

Sagnate Investment Ltd. v. Norwich Corpn. [1971] Court of Appeal 614 ***(refd)***

British Oxygen Co. Ltd. v. Minister of Technology [1971] AC 610 ***(refd)***

Lau Liat Meng v. Disciplinary Committee [1967] 2 MLJ 141 ***(refd)***

Majlis Peguam Malaysia & 3 Ors. v. Joseph Au Kong Weng [1993] 2 CLJ 417 ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 34, 98 & 99
Solicitors Account Rules 1990

For the plaintiff - C.K.G. Pillay (S. Kanawagi with him); M/s. C.K.G. Pillay & Partners

For the defendant - C. Abraham (Maidzuara Mohammed with him); M/s. Shearn Delamore & Co.

JUDGMENT

Anuar bin Dato' Zainal Abidin J:
On 13 May 1993, the Court heard the above O.S. praying that the defendant be directed to issue forthwith the plaintiff a Sijil Annual for the year 1993. On the same occasion, the Court heard an application by the defendant that the interlocutory injunction against it granted on 5 April 1993, he set aside followed by other consequential reliefs. Both matters were heard together for the sake of expediency and as the facts and affidavits are closely interlinked. Upon conclusion of the hearing I reserved judgment to study in depth the facts and law involved in view of the importance of the decision to the legal profession and the case being first of its own kind to my knowledge.

Subsequent to the hearing on 13 May 1993, Counsel for the defendant sent to me a copy of the Supreme Court decision in Civil Appeal No. 02-371-91. (See *Majlis Peguam Malaysia & 3 Ors. v. Joseph Au Kong Weng* [1993] 2 CLJ 417). With due respect to the learned Counsel, I cannot derive much assistance from the said judgment which relates to a different subject and which appears as a guide only for the interpretation of ss. 98 and 99 of the Legal Profession Act as indicated in the last paragraph page 29 of the said judgment.

First, in the sequence of events, I will deal with the plaintiff's prayer followed by that of the defendant's.

The plaintiff was admitted to the Malaysian Bar as an advocate and solicitor on 25 April 1987. Since then, he has been practising as an advocate and solicitor in Johor Bahru in various capacities without interruption. In January 1990, he decided to associate with another senior lawyer, Zaibuddin Ambak in Kuala Lumpur. The true nature and extent of such association are in dispute except that both lawyers used the firm name of Zaibuddin Ambak and Associates.

In December 1991, the association between them ended, the plaintiff changing his style of practice to J. S. Pillay and Co.

On 30 November 1992, the plaintiff applied to the defendant for issue of Sijil Annual in question in the prescribed manner enclosing his "own" office accounts in Johor Bahru. There were some queries by the defendant regarding Kuala Lumpur office of the "firm". In response, the plaintiff submitted a statutory declaration on 12 February 1993. He also had occasion to forward a redesignated Accountant's Certificate modifying its title but not the contents at all, to comply with the formal requirements made by defendant's secretariat.

Finally on 18 March 1993 the defendant wrote to the plaintiff a short letter to the effect that the defendant was of the view that the plaintiff's application for Sijil Annual cannot be considered until he "complies" with the requirements of the Act and produce the Accountant's Certificate of his "branch office". The defendant also pointed out to the plaintiff the latter's right to apply to Court under the Act above. In consequence, leading to the present O.S.

In the main, the contention of the plaintiff is that the defendant did not make appropriate enquiries before withholding or non-issuing the Sijil Annual. He complained that he was never given the opportunity to exculpate himself before being deprived of his livelihood. It was not easily possible for him to produce the accounts of Zaibuddin Ambak who was suspended from practice by the Chief Justice at the instance of the Bar without the plaintiff being aware of the situation leading to such action. The plaintiff also averred that he has, at all material times, done his best to trace and persuade his colleague to submit the accounts but was unlikely or impossible to succeed.

Insofar as the plaintiff is concerned, he has accounted for all moneys received from his clients and that there is no complaint against him since his practice. His Counsel relies on common law indicating individual liability of each lawyer in such situation. In reply, the defendant averred that the plaintiff was a partner of the firm Zaibuddin Ambak & Associates by his own admission at earlier stage. The defendant did not rebut or question the plaintiff's statement on oath that he was not aware of any action in Kuala Lumpur which his associate took and he was not in a position to be so aware.

At the hearing of this action, the plaintiff relied on two affidavits sworn on 5 May 1993 (Encl. 1) and 10 May 1993 (Encl. 2) but they are verbose and irrelevant in many instances for my decision.

The points of law involved are what should be the guiding principles before I exercise my jurisdiction one way or the other.

Where a statute has provided a full right of appeal to a Court, as in this case, vide s. 34 of the Act against an official decision, the Court should be able to apply its own view of the merits provided it has due regard to the opinions of the authority which made the first decision. Dictum in *Sagnate Investment Ltd. v. Norwich Corpn.* [1971] Court of Appeal 614 and many other cases in similar vein leads me to this interpretation. The same authority and many other case law including *British Oxygen Co. Ltd. v. Minister of Technology* [1971] AC 610 states that any administrative authority must not apply its policy so rigidly without hearing what an individual applicant has to say are exceptional features of his case. While policy is an important guide, no authority must shut its eyes to an individual applicant.

Another aspect of law is that in all cases of depriving a man of his livelihood or in frustrating legitimate expectation, fairness is of paramount importance as emphasised in *Lau Liat Meng v. Disciplinary Committee* [1967] 2 MLJ 141. Bearing these principles of law in mind, I now wish to review the sole question, that is, whether the plaintiff's application for Sijil Annual should be withheld.

To decide this issue, it is not necessary for me to arrive at any finding as to the nature of the disputed partnership relationship. Whatever be my decision regarding the Sijil Annual, it does not prejudice the right of any party to seek recovery from the plaintiff if there is ample evidence of him holding out or being a partner otherwise a competent Court decides so.

These are hypothetical situations even though one year and few months have elapsed since the alleged partnership or association ceased with no sight of such claim yet. The first question for me to consider is whether the plaintiff is bound in all the circumstances to procure the Accountant's Certificate for his colleague Zaibuddin Ambak. Insofar as the plaintiff is concerned, he has accounted for all the moneys received from clients he attended, the primary object of legislation. In his affidavit sworn on 12 February 1993, among other things, the plaintiff stated that he never was a signatory to either the office account or clients' account of the Kuala Lumpur office and vice versa meaning the office of Zaibuddin Ambak who engaged auditors different from those of the plaintiff. He vehemently disclaims any definite arrangement of partnership, each lawyer minding his own practice alone.

I now pause to decide whether the defendant could have considered carefully the exceptional features of the plaintiff's reasons for not being able to produce his colleague's accounts. Its only response was the plaintiff did not comply with the Act.

Similarly, in his affidavits, the plaintiff alleged that the defendant denied justice by not making any enquiry at all. In this context, I am of the opinion after studying minutely the Legal Profession Act 1976 and The Solicitors Account Rules 1990 that the defendant has wide discretionary power to exempt the plaintiff from strict requirements of rules relating to submission of accounts.

The defendant ought to know that separate accounts are kept for two legal establishments of the same firm, the one in Kuala Lumpur and the other in Johor Bahru having accepted this format in the preceding year.

Although I feel that the plaintiff's second affidavit dated 10 May 1993 is too verbose and irrelevant in some instances, I cannot ignore what he swore in page 11, paragraph 16(b) of his second affidavit. He stated that there was at least one case of a lady lawyer being issued a Sijil Annual without the Accountant's Certificate probably for good reason but based on her undertaking or some private arrangements made between her and the Bar Council. Although the name of the lawyer was revealed during the hearing, the defendant's Counsel was not able to rebut the statement.

On review of the whole evidence, I am of the opinion that the defendant was merely relying on "holding out" as the reason for withdrawal of the Sijil Annual and did not consider the plaintiff's request with the care it deserves although it involves him being deprived of his livelihood indefinitely causing him loss of his career. The defendant has all the statutory power which it never exercised to check the plaintiff's accounts at its option even without a complaint.

There is no evidence that withholding the Sijil Annual will serve anyone's interest and will promote the cause of justice. If for any reason, it is adjudicated that the plaintiff has to pay for the "firm's" liability, of which I have no evidence